
(1942) 11 MAD CK 0038
In the Madras High Court

Lakshmana Koro and Another

APPELLANT

Vs

Malladi Visweswara Patrudu and Another

RESPONDENT

Date of Decision : 23-11-1942

Acts Referred:

Citation : AIR 1943 Mad 346 : (1943) 56 LW 104 : (1943) 1 MLJ 174

Hon'ble Judges : Kunhi Raman, J

Bench : Division Bench

Judgement

Kunhi Raman, J.—The decree-holder is the appellant. An interesting question of law arises in this appeal and relates to the applicability of Section 47 of the CPC in the following circumstances. The decree in the present case was passed in O.S. No. 35 of 1928 on the 20th April, 1928. On the 25th March, 1940, a few days before the decree became completely barred by limitation u/s 48 of the Civil Procedure Code, an execution petition which was numbered as E. P. No. 132 of 1940 was filed in the Court of the District Munsiff of Sompeta. The amount which was sought to be recovered by attaching the immovable properties of the judgment-debtor was Rs. 3,640-13-6. The learned District Munsiff fixed the 18th July, 1940, for filing sale papers and encumbrance certificate and adjourned the execution petition to that date. On that date the order made is in the following terms:

. . . . the judgment-debtor (respondent) is ex parte. Sale papers and encumbrance certificate are not filed. Dismissed. No costs. Attachment to cease.

From this order an appeal was presented to the Court of the Subordinate Judge of Chicacole. Before the learned Subordinate Judge the respondent appeared and raised a preliminary objection that the appeal did not lie. This objection has been upheld by the lower appellate Court, which has rejected the appeal. From that order the present civil miscellaneous second appeal is filed. The respondent is not represented in this Court.

2. Mr. Subba Rao the learned advocate for the appellant contends that the view

taken by the lower appellate Court that the order appealed from was one of dismissal for default under Order 21, Rule 57, Civil Procedure Code, and that consequently no appeal lay from that order is not in accordance with law. Learned Counsel argues that in the present case in any event since the dismissal was of an execution petition Which was the last of its kind that could have been filed within the period of limitation for executing the decree in O.S. No. 35 of 1928, the order must be held to be one falling u/s 47 of the Civil Procedure Code. He refers to the definition of " decree " contained in Section 2, Clause 2 of the CPC and argues that the order in the present case conclusively determines the rights of the parties with regard to all the matters in controversy in the suit and that in the special circumstances of this case the lower appellate Court ought to have held that it was an order falling u/s 47. The principle underlying this contention seems to have been recognised by the Calcutta High Court in the decision reported in Mohim Chandra De v. Mohendra Kumar De Sarkar (1920)57 I.C. 905 and by the Lahore High Court in Mst. Durga Devi v. Hans Raj I.L.R. (1929) Lah. 402. This view is quoted with approval in the commentaries of Sir Dinshaw Mulla on the CPC at page 9 of the eleventh edition. The lower appellate Court has in support of its conclusion, relied upon the decision of the Calcutta High Court reported in Amarendra Nath Mallick Vs. Balai Chand Ghatak, . That case may be distinguished on the ground that the execution petition that was dismissed was not the last that could have been filed and that there was still time for presenting another execution petition within the period of limitation. Accepting the principle recognised in the decisions in Mohim Chandra De v. Mohendra Kumar De Sarkar (1920)57 I.C. 905 and Mst. Durga Devi v. Flans Raj I.L.R.(1929) Lah. 402 I hold that the order made by the learned District Munsiff in the present case is an order falling u/s 47 of the CPC and that consequently an appeal does lie from that order.

3. The decision of the lower appellate Court must therefore be set aside and the appeal remanded to that Court for disposal according to law. The appellant shall have his costs in this Court.